

ARE MUNICIPAL COLLECTIVE BARGAINING AND MUNICIPAL GOVERNANCE COMPATIBLE?

Leo Troy[†]

Collective bargaining and municipal governance are compatible, but at a cost. This paper presents three models revealing the impact of public sector bargaining on local governments. One of the detrimental effects of municipal bargaining is government insolvency ending in de facto or de jure bankruptcy. Municipal governance and sovereignty, particularly at the local level, are severely compromised by financial insolvency. Public sector bargaining is not an extension of collective bargaining in the private sector; it is *sui generis*. One factor that makes public bargaining unique is that municipal leaders are elected, inserting political considerations into the municipal collective bargaining process.

I. UNIQUE MODEL OF LABOR-MANAGEMENT RELATIONS.

Collective bargaining and municipal governance are compatible, but at a great price. This high price is rooted in the unique model of labor-management relations in the public sector and in particular at the local level of government. The government model differs from the private sector in the way collective bargaining is performed and its consequences for consumers in the private and public economies. Collective bargaining in government is not identical to bargaining in the private labor market, as portrayed by conventional wisdom and academic literature.¹ What the literature identifies as an employer in the public domain is not as clearly a definable term as it is in the private sector. Above all else, the public employer is endowed with a unique characteristic—sovereignty—for which there is no counterpart in the private economy.

Sovereignty makes public employers distinct from private employers

[†] Distinguished Professor of Economics, Rutgers University – Newark. Professor Troy has published several books, scholarly articles, and newspaper editorials. He has received grants from the National Science Foundation and private foundations and has twice been a visiting Fulbright Professor.

1. Richard B. Freeman, *Unionism Comes to the Public Sector*, 14 J. ECON. LITERATURE 41 (1986).

in several ways. For instance, unlike private businesses, public employers do not go out of business because of financial failure. Moreover, the public employer is only a surrogate or agent for the taxpayer. Taxpayers enter the arena of collective bargaining indirectly, as the source of funds for the public employer and the recipient of the public services negotiated. Unlike consumers in the private economy, taxpayers have no option to reject public services for other readily available substitutes. The surrogate public employer determines the terms of any negotiation with employees and how it will be implemented. Yet, the consequences of the negotiations are not borne by the agent negotiator, but by the taxpayer and the sovereign political jurisdiction. Collective bargaining, *ipso facto*, implies both a diminution and a sharing of sovereign authority as well as a shifting of the financial burden to a diffuse group, the taxpayers, who as individuals may not perceive the costs or the benefits, accruing to each citizen.

According to conventional wisdom, collective bargaining in the public sector accomplished via power sharing between taxpayers and their agents, government employers, as equivalent to the diminution of managerial prerogatives, is a different form of power sharing than in the private sector.² Not only is this view simplistic, but it obscures the underlying radical way that power sharing affects public governance. Power sharing in the public domain contrasts with the typical adversarial relationship between representatives of the workers and management in the private sector. There are periodic demands, mostly from academics, to introduce power sharing, beyond collective bargaining, into the private sector as well, using the German model of co-determination.³ Not surprisingly, private employers have ignored and resisted these overtures, realizing that their ability to manage their enterprises would be circumscribed.⁴ In contrast, public management has commonly accepted power sharing or co-determination, despite no formal recognition of the practice.

Public government's acceptance of co-determination is traceable to the political dimension of collective bargaining in the public sector. Above all, the political element woven into public sector bargaining distinguishes the public from private sector collective bargaining. In fact, what is called collective bargaining in the public sector should more accurately be called political collective bargaining. Public employers or managers are also politicians who depend on the support of their bargaining "adversaries" at election time to retain their public positions. This poses a conflict of interest between their role as employers and managers, and their role as

2. LEO TROY, *THE NEW UNIONISM IN THE NEW SOCIETY* 4, 79-80, 86, 133 (1994).

3. THOMAS A. KOCHAN, HARRY C. KATZ & ROBERT B. MCKERSIE, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 178-89 (1986).

4. Leo Troy, *Will A More Interventionist NLRA Revive Organized Labor?*, 13 HARV. J.L. & PUB. POL'Y 583 (1990).

public officials functioning on behalf of the electorate, especially those who pay taxes. Further, dependence upon the electoral support of their "partners" in collective bargaining, the unions, puts pressure on their ability to resist extravagant demands.

The types of political support which unions can supply their employer bargaining "opponents" spell out the conflict of interest between the public officials' bargaining stance and their political stance. Unions' political support of favored candidates and platforms comes in two forms, cash and in-kind.⁵ Of the two, the latter is far more important, especially in municipal and school elections. There are three major types of in-kind support in the elections process: (1) free labor time; (2) information; and (3) the unions' structure.⁶

Free labor time comes from two sources: union members and employees of unions. Both groups provide free electioneer services of all kinds to a candidate or the political party endorsed by the union. It is widely believed that the difference between the groups is that employees of unions are given time off with pay to work for the unions' endorsed candidates and party, while members work at no charge.⁷ The total number of individuals drawn from both sources is not known, although nationally unions have said they can be counted in the thousands.⁸ No one knows how many persons unions employ, including the U.S. Department of Labor.⁹

The second type of support, informational support, consists of the hundreds of union newspapers and magazines nationwide that endorse favored candidates and political parties.¹⁰ These are paid for with members' dues and are sent to over 16 million members nationally, reaching a large audience across the country.¹¹ These journals carry the union's recommendations on candidates and the political party, and disregard or denigrate those of the political opposition.¹²

The third type of support, organizational, flows from the structure of unions in the United States. There are an estimated 45,000 unions in the country.¹³ Of these, perhaps forty-four percent are in the public sector.¹⁴

5. *Constitutional Issues Impacting Campaign Reform: Hearings Before the Senate Committee on Rules and Administration*, 106th Cong. 425-32 (2000) (statement of Leo Troy).

6. *Id.*

7. *Id.*

8. Leo Troy, *Twilight For Organized Labor*, 22 J. LAB. RES. 245 (2001).

9. *Constitutional Issues Impacting Campaign Reform*, *supra* note 5.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Estimate by author. No count available from the U.S. Department of Labor.

District and state organizations are very important among some governmental unions, notably the American Federation of State, County and Municipal Employees, the National Education Association and the American Federation of Teachers. This structure puts unions in a very powerful and influential position to assist candidates and the political party of choice. To the extent that all politics are local, the leverage of governmental unions is great in municipalities and school districts because these jurisdictions are the closest to the public employer-politicians. Thus, union support for or opposition to a local politician can greatly influence whether that individual is elected.

Paradoxically, conventional wisdom, while claiming the absence of differences in collective bargaining between the public and private sectors, nevertheless demands reforms in public labor law and practices in order to convert the public model into an image of the private one. At the top of the list of reforms is legislation to bestow on public labor organizations the rights of full collective bargaining.¹⁵ This means giving government unions the right to strike, with a few obvious limitations (for example, for police and firefighters), and to enlarge the scope of issues subject to bargaining.¹⁶

In public education, the teachers' unions have already gone further than private unions in demanding the right to influence, if not determine, what is taught and how.¹⁷ The California Teachers Association, an affiliate of the National Education Association, was defeated recently in the California Legislature when it sought legislation to expand the mandatory subjects of collective bargaining to include the selection of school books.¹⁸ This is akin to having unions in the private sector explicitly demanding co-determination in how to produce a firm's product or service. Actually, unions implicitly do so in many ways; since they can impose work rules they do influence if not determine how production is carried out in both sectors.¹⁹ However, influencing what economists call the production function is more comprehensive in the public domain, especially in

15. Louis C. LaBrecque, *Labor Must Move with Times*, DAILY LABOR REPORT, Sept. 2, 1999, at A-10; Leo Troy, *The Impact of the Teachers' Unions on Educational Policy and Outcomes*, HANDBOOK OF EDUCATIONAL POLICY (1998).

16. Leo Troy, *The Proposed Fire Fighters' Labor Act of 1987: An Analysis and Critique*, 8 GOV'T UNION REV., No. 3, 1, 1-37 (1987); *The Philosophy of American and Canadian Unions*, in ADVANCES IN INDUSTRIAL RELATIONS 9 (David Lewin & Bruce E. Kaufman eds., 1999).

17. MYRON LIEBERMAN, THE TEACHER UNIONS: HOW THE NEA AND AFT SABOTAGE REFORM AND HOLD STUDENTS, PARENTS, TEACHERS, AND TAXPAYERS HOSTAGE TO BUREAUCRACY 103 (1997).

18. Jim Sanders, *Union Considers Ballot Initiative on Giving Teachers More Control After Assembly Killed Bargaining Bill, Group to Weigh Asking Voters*, MODESTO BEE, June 2, 2002, at A4.

19. THOMAS KOCHAN, HARRY C. KATZ & ROBERT B. MCKERSIE, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 189-207 (1986).

education. If the public sector unions' demands to eradicate distinctions in collective bargaining between public and private sector bargaining were implemented, the differences between the two would not be erased because the differences are greater than the conventional wisdom's subtle acknowledgment concedes.

Labor-management relations in municipalities and school boards are different from both the public and private sector. They comprise the dominant form of public sector bargaining because most public employees, over 13.4 million in 2001, were employed by local government (mostly in education), compared to 4.9 million at the state level, and 2.6 million at the federal level.²⁰ Incidentally, total government employment even exceeds employment in manufacturing, indicating the importance of government relative to the largest goods-producing sector of the economy and the center of most private unionism.²¹ Although some organized private industries are also labor intensive, like government, the most important difference in collective bargaining between the two sectors is, again, the *political* dimension of labor-management relations in government, and particularly so at the local level. At the local level of government, the political aspect of the bargaining relationship is most significant because the public employer, as an elected official, is largely dependent on the union's wealth and membership (the voters). And this correlation between labor-intensive industries and local politics leads to a distortion of labor costs by altering work rules to accommodate union demands. This has severe financial consequences, as the three models reviewed in this paper will demonstrate. This distortion of labor costs not only affects total compensation, but also hides the real costs of labor.

In contrast to public employers, private employers have a much freer hand in offsetting high direct compensation costs. A variety of measures such as introducing technological improvements, redesigning how work is done, reassigning workers, promoting workers based on merit, and paying workers based on merit are much more easily implemented by the private employer than the public employer.²² This is a direct consequence of the political component of collective bargaining in government. Conceptually, the application of these measures allows the private employer to compensate labor costs per unit of output -- the real cost of labor. If union work rules checkmate productivity, then labor costs per unit of output rise or even soar, as is frequently the case in municipal labor relations. Indeed, how often has the public been told following the signing of a new collective bargaining agreement that public management has received

20. BUREAU OF LABOR STATISTICS, 49 EMPLOYMENT AND EARNINGS 42 tbl. B1 (Mar. 2002).

21. *Id.*

22. LEO TROY, BEYOND UNIONS AND COLLECTIVE BARGAINING 122-23 (1999).

agreements from the unions to measure increasing productivity only to learn later that nothing has changed?

Of course, explicit compensation in the form of wages and benefits play a direct role and organized public employees are generally more highly paid than organized private union members. A comparison of unionized earnings between the public and private workers in the metropolitan areas of New York, Los Angeles, Philadelphia and Detroit, for example, shows that in 2001 mean weekly and hourly earnings in constant dollars consistently exceeded those of organized workers in the private sector.²³ These earnings figures apply to workers' principal job and include the usual pay for overtime, commissions, and tips but exclude bonuses and non-wage benefits (health insurance, pensions, etc.) which are doubtless higher in the public sector.²⁴

Table A: Mean Weekly Earnings in Constant Dollars of Public and Private Organized Workers in Four Cities, 2001²⁵

	New York City		Philadelphia		Los Angeles		Detroit	
Sector/ Variable	Earnings \$	Density %	Earnings \$	Density %	Earnings \$	Density %	Earnings \$	Density %
Public	798	69.8	762	54.8	781	31.3	802	59.6
Private	787	15.1	729	12.7	760	12.3	743	16.8

The figures in Table A are not a quantitative comparison of union to nonunion workers; that is, they do not assess how much unions raise wages relative to comparable nonunion workers. The method assesses which of the two organized sectors, government or private, has a larger relative wage effect compared to nonunion workers, and it is believed that private unions have an edge.²⁶ But as Richard Freeman argued in his comprehensive article on public sector unionism in 1986, the relative wage effect of public sector unions, compared to private unionism, is probably understated.²⁷ The figures presented in Table A support the judgment that government unionism raises wages more than private sector unionism. Specifically, the

23. BARRY T. HIRSCH & DAVID A. MACPHERSON, UNION MEMBERSHIP AND EARNINGS DATA BOOK 36-47 tbl. 6a (2002). Density is the percentage of the labor market organized.

24. *Id.*

25. *Id.*

26. *Id.*

27. Freeman, *supra* note 1, at 41-86.

figures in Table A compare organized public to organized private workers in the Standard Metropolitan Statistical Areas (SMSA) and show that organized public employees have higher earnings and wages than organized private workers in the same SMSAs. Only in private manufacturing are unionized earnings sometimes greater than those of public workers. This is due to additional factors that enhance the wage lifting power of unions in manufacturing.²⁸

The reasons that organized governmental workers' wage effects are probably greater than conventional wisdom suggests is that their upward pressing and wage rigidity effects exceed those of organized labor in most of the private sectors.²⁹ These effects are stronger in the public sector labor market due to very little competition.³⁰ Public employers have fewer opportunities to substitute capital for labor than in the private sector because government is a labor-intensive industry and, even more importantly, because of the greater pervasiveness of Luddism.³¹ Finally, it is likely that comparisons of the two sectors fail to take into account the numerous fringes, pensions, holidays, sick leave and other benefits prevalent in the public sector.³² This is illustrated by what I call "The Philadelphia Story" described later in this paper. The unions' wage lifting and wage rigidity powers in government make it difficult for local governments to limit wage increases or to offset them by introducing measures to increase productivity. Not surprisingly, these union powers have contributed to precarious fiscal conditions, including insolvency. It should be noted that in his comprehensive account of public sector unionism published in 1986, Freeman made no mention of the de facto bankruptcy of New York City, which occurred a decade earlier in 1975. Nor did he address the de jure bankruptcy of the San Jose, California school district which took place in 1983, although both were in great measure the consequence of collective bargaining at the local governmental level.³³ In addition, no textbook on labor relations mentions bankruptcy in connection with collective bargaining in government. One can only speculate as to why.

It would be an oversimplification to attribute costly municipal labor relations solely to intractable union demands, or simply to a supine public management engaged in collective bargaining. It is the political character of the municipal labor-management relationship that is the core of the

28. *Id.*

29. HIRSCH & MACPHERSON, *supra* note 23, at 47.

30. See Milton Friedman, *Some Comments on the Significance of Labor Unions for Economic Policy*, in DAVID MCCORD WRIGHT, *THE IMPACT OF THE UNION* 204-34 (1951).

31. LEO TROY, *THE NEW UNIONISM IN THE NEW SOCIETY* 63 (1994).

32. *Id.*

33. Freeman, *supra* note 1.

financial difficulties of local governments and hinders steps to offset the resulting high unit costs of labor. Not only does the political factor distinguish labor-management relations in the public from the private sector in general, but it gives public, especially local labor-management relations, a comparative advantage over private sector relations insofar as compensation is concerned. This is indicated in Table A.

In addition, other important conditions of employment such as disciplinary procedures, layoffs, and the permanent closing of establishments give public unions a comparative advantage because they enhance the unions' wage rigidity, the upward pressing effects of public unionism and collective bargaining relative to the private sector. Financial losses may compel a private employer to shut down and go out of business, but municipalities and other public jurisdictions cannot go broke and close down. They may undergo bankruptcies and reorganization of their finances, but like the phoenix, they rise again.

The proximity of local public officials to their employees, a proximity which applies particularly to mayors and school board officials (elected or appointed) more than to other public officials makes them more vulnerable to the financial pitfalls of political collective bargaining. As the late Speaker O'Neill observed, "All politics is local," and its application is most demonstrable in local public sector bargaining.³⁴ Politically ambitious mayors and similar elected officials view bargaining with municipal unions and other local unions as a cornucopia of opportunity. By fostering union organization and collective bargaining, mayors and school board officials create a political partnership of enormous potential. The political partner, the union, provides financial and in-kind contributions during elections that are ultimately funded and supplied by member dues and fees (typically mandated in the bargaining agreement). Union or agency shop fees may require payment of dues as well.³⁵ This compulsory payment of dues and fees transforms the union into a powerful financial as well as political machine. Politically, the union becomes a potent source of financial and in-kind political support at no personal expense to the candidate and at little expense to the party.

34. See, e.g., TIP O'NEILL, *ALL POLITICS IS LOCAL: AND OTHER RULES OF THE GAME* (1995).

35. The agency shop is a contract clause in collective bargaining agreements requiring non-members to pay the equivalent of union dues as a condition of employment. The union shop is a contract clause in a collective bargaining agreement requiring members to pay dues as a condition of employment. See *LABOR LAW COURSE* 299-329 (19th ed. 1987).

II. FINANCIAL CONSEQUENCES

The consequences of political collective bargaining are evident in how municipalities are governed, how public education is delivered, and why labor costs can become so steep as to lead to bankruptcies of both school boards and municipalities. Although bankruptcies occur and are far more frequent in the private sector, the fact that a public jurisdiction can be bankrupted cannot be equated with the profit/loss risk in the private sector. Approval or disapproval of the results in the public sector can only be addressed through an election, a procedure which comes at discrete intervals and can be manipulated during the political process. As a result, public employers are virtually immune to markets. In contrast, private employers are exposed to markets and the intensity of these forces has increased over recent decades.³⁶ Private employers are also answerable to boards of directors, stock markets (if shares are publicly traded), and stockholders.³⁷ Mistakes are punished much more quickly and the enterprise can pay the ultimate price of going out of business. Even in the worst circumstance of bankruptcy governments do not go out of business. There are, however, serious consequences that affect the efficacy of local government, as the three models analyzed in this paper reveal.

Local political collective bargaining has contributed to actual or potential bankruptcy on cities and school boards. The outstanding examples were the de facto bankruptcy of the City of New York in 1975, the de jure bankruptcy of the school district of San Jose, California in 1983, and the brinkmanship of Philadelphia in 1992. Philadelphia avoided disaster only because of the bold leadership of its Mayor, Edward G. Rendell. The three models demonstrate different ways in which local governments have dealt with bankruptcy, how municipal collective bargaining challenged the viability of municipal government sovereignty and why it is reasonable for this paper to ask, "Are Municipal Collective Bargaining and Municipal Governance Compatible?"

A. The Bankruptcy of New York City, 1975

The first model of municipal response to financial insolvency is that of the City of New York. The City went bankrupt in 1975 when it could not market its debt; it avoided legal bankruptcy under Chapter 9 of the Bankruptcy Code only by taking extraordinary measures that reduced municipal sovereignty. To avoid filing for bankruptcy under the Federal Bankruptcy Code, the City needed to obtain the approval of fifty-one

36. Leo Troy, *Twilight For Organized Labor*, 22 J. LAB. RES. 245 (2001).

37. *Id.*

percent of its debt holders in order to institute a plan of financial reorganization.³⁸ At the time, there were an estimated 160,000 individuals or families who held \$5 billion, about two-thirds of the outstanding bonds, and many others were registered in nominees' names.³⁹ Due to the dispersion of the debt it was impossible to secure the required percentage of the bondholders, fifty-one percent, to gain approval for a plan of reorganization, so an alternative was devised.⁴⁰ But also compelling was the necessity of avoiding the political cost of admitting financial bankruptcy by the city administration (Mayor Abraham D. Beame 1974-77). To avoid legal bankruptcy, therefore, the assistance of the State of New York was enlisted, or perhaps more accurately, was forced upon the City.⁴¹ The State became the surrogate for the oversight financial reorganization by a federal court under the Federal Bankruptcy Code.⁴² Theoretically, the Federal Bankruptcy Code does not give the courts the authority to act as an executive and legislative body, but it does permit the courts to interfere with the governmental power of a debtor municipality such as its property and revenues. The courts have exercised such powers, which are the equivalent of actions that would be ordinarily taken by municipal executives and legislative bodies.⁴³ Hence, the Bankruptcy Code provides a mechanism for curtailing the sovereignty of a municipality when it becomes insolvent. In the case of the San Jose, California school district, collective bargaining was the sole cause.

In the New York City case, the State of New York set up an Emergency Financial Control Board (the Control Board), which is still in existence.⁴⁴ The Control Board included the Governor of New York, the Mayor, the City and State Comptrollers, and three members appointed by the Governor; they were assisted by a Special Deputy State Comptroller.⁴⁵ Effectively, the Financial Control Board took control of the finances of the City of New York. The Control Board began with a financial plan for New York City to cover a three-year period from 1975-78.⁴⁶ The Board was given the power to approve all major business contracts, including labor contracts, to estimate revenues and expenditures, and to extend a freeze on

38. J. E. Spiotto, *Municipal Insolvency: Bankruptcy, Receivership, Workouts and Alternative Remedies* (1991) (unpublished manuscript); LEO TROY, *THE NEW UNIONISM IN THE NEW SOCIETY* 147-49, 152-54 (1994).

39. LEO TROY, *THE NEW UNIONISM IN THE NEW SOCIETY* 140 (1999).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

hiring through the fiscal year of 1978.⁴⁷ The Board also had the power to disburse City revenues after being satisfied that they were consistent with the financial plans.⁴⁸ Its powers also covered the City's semi-independent agencies, the public school higher education system, hospitals, and other services.⁴⁹

To overcome the City's financial exigency the State established the Municipal Assistance Corporation (MAC), which was empowered to convert the City's short-term debt into long-term debt.⁵⁰ This was accomplished through a new bond issue with an attractive interest rate, guaranteed by a four percent sales tax and a stock transfer tax, both of which were heretofore paid to the City.⁵¹ Moreover, the bonds carried the moral obligation of the State of New York. The state legislature enacted special default legislation shielding the City from creditors for 90 days, coupled with the filing of a financial plan for repayment with the state supreme court.⁵² In addition, the U.S. Congress enacted legislation authorizing the Secretary of the Treasury to make short-term loans to the City which were not to exceed \$2.3 billion at any one time.⁵³

Major purchases of the MAC bonds were made by the City's five pension funds, including both unionized and non-unionized workers.⁵⁴ Unions trumpeted their investments as demonstrative of their commitment to the City and their civic virtue in saving the City from a financial debacle, ignoring their role in contributing to the City's problems in the first place.⁵⁵ Their action is reminiscent of the joke about a child who kills his parents and then asks the court for leniency because he is an orphan. The financial plan worked and the City recovered from the disaster.⁵⁶ When Edward Koch was elected Mayor in 1978, he followed the financial discipline required to maintain solvency.⁵⁷ However, lurking in the background were those emergency measures invoked during the term of his predecessor, Abraham Beame. Furthermore, the path to New York City's financial disaster began some two decades earlier, under the administration of Mayor Robert F. Wagner, Jr., when the practice of selling short-term bonds to meet current expenditures apparently began.⁵⁸ Wagner encouraged

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

municipal unionism and collective bargaining in 1957, five years before President Kennedy introduced, by Executive Order, unionism and collective negotiation to the executive branch of the federal government in 1962.⁵⁹ No doubt, he was acting in the tradition of his father, Senator Wagner, who sponsored legislation in the Senate which we know today as the National Labor Relations Act.⁶⁰

In 1991-92, the City was on the verge of again losing control of its finances under the mayoralty of David Dinkins.⁶¹ The Chairman of the MAC (still in existence) rejected the Mayor's proposed five-year budget plan because the City wanted to substitute a \$1 billion sale of MAC bonds for a real estate tax.⁶² This would be a substitution of long-term indebtedness for current expenditures, a financial practice similar to those which had previously landed the City in the soup.⁶³ In this instance, Dinkins wanted to substitute long-term MAC bonds instead of short-term bonds to meet current expenditures.⁶⁴ The Emergency Control Board demanded that the City reduce employment.⁶⁵ The unions' stunned reaction was that such actions would effectively destroy the social programs they had elected Dinkins to deliver!⁶⁶

The immediate cause of New York City's de facto bankruptcy in 1975 was financing short-term needs with bonds. Ultimately, a major cause, if not the major cause, was the acquiescence to unions' demands for compensation without the City receiving offsetting gains in productivity, which resulted in soaring unit labor costs. Donna Shalala, later Secretary of the Department of Health and Human Services under President Clinton, and Carol Bellamy, once president of the New York City Council, co-authored an article assessing the de facto bankruptcy of New York City in which they provided many interesting details and omissions.⁶⁷ They attributed the financial debacle to the inability of city officials, from Mayor Robert F. Wagner, Jr. through 1975, to say "No" to unspecified groups.⁶⁸ At the same time, Wagner and his successors were unable to get what Shalala and Bellamy called a "quid pro quo," a euphemism for agreements from the unions to alter work rules in order to increase productivity.⁶⁹

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Todd S. Purdum, *Dinkins Has a 5-Year Plan; Critics Say it Doesn't Add Up*, N.Y. TIMES, Nov. 10, 1991, at E8.

67. Donna Shalala & Carol Bellamy, *A State Saves a City: The New York Case*, 4 DUKE L.J. 1119 (1976).

68. *Id.*

69. *Id.*

Who were the unidentified groups referred to by Shalala and Bellamy? Given their liberal political convictions, it is unsurprising that they did not identify the groups to whom successive Mayors could not say "No." Neither the word "unions" nor "clients" of the City's costly welfare system appeared in their analysis.⁷⁰ But surely the unions and the welfare recipients were the unidentified major groups to whom city administrations could not say "No." Most of Shalala and Bellamy's analysis focused on the loss of revenues from the tax base, not on the demand side of the equation. However, the loss of revenues can be more accurately attributed to the City's inability to say "No" to the unidentified groups.

The mismanagement of the City's finances was not the only cost imposed on the City and perhaps not even the most severe. Clearly, the role and activities of the Emergency Financial Control Board undercut municipal sovereignty.⁷¹ The special arrangements to avoid *de jure* bankruptcy transferred political power from the democratically elected municipal officials to an appointed administrative board. Even Shalala and Bellamy described the transfer of authority from the City's elected officials to an appointed board as "a program of governance" which "eliminated the last vestiges of fiscal home rule of the City."⁷²

Technically the City did not go belly up, but the governance of New York City has not been the same ever since—state supervision has always remained lurking in the background. If the City of New York should end its fiscal year more than \$100 million "in the red," the Financial Control Board automatically re-asserts its authority.⁷³ Clearly, municipal collective bargaining exacted a toll on municipal governance and procedures; the results establish a definitive distinction between municipal and private bargaining, and for that matter, even between municipal and public sector bargaining at the state or federal levels of government. Localized collective bargaining is *sui generis*.

B. The San Jose, California, School District Model, 1983

The case of the San Jose, California School District is another model of response by a local government to bankruptcy for which unions and collective bargaining were responsible in whole or in part.

In contrast to the New York City model, the San Jose insolvency was resolved under the Federal Bankruptcy Code of 1937. In 1983, the School District became financially insolvent when it could not meet its debts for telephone and water utilities, the wage increases it had contracted to pay its

70. *Id.*

71. *Id.*

72. *Id.* at 1128.

73. Spiotto, *supra* note 38.

employees (mostly teachers), and payments on the debt to its bondholders.⁷⁴ Under the Code of 1937, the School District could have gone into bankruptcy and the bondholders would have been forced to line up with all other creditors to receive any payment.⁷⁵ Furthermore, fifty-one percent of School District creditors would have to approve a move to bankruptcy under Chapter 9 of the Act.⁷⁶ Once the move into Chapter 9 occurred, revenues dedicated to the payment of bondholders could have been allocated for any purpose, thereby changing bondholders into general creditors.⁷⁷ However, the School District chose to avoid the repudiation of its debt because it would have impaired its future ability to borrow.⁷⁸ It was able to do so because amendments to the Bankruptcy Code in 1988 secured the interests of the bondholders even when the School District went into bankruptcy.⁷⁹ In contrast to corporate bankruptcy law, under the amended Code, the creditors could not involuntarily put a municipality or school district into bankruptcy because of financial mismanagement.⁸⁰ This distinction is significant because it was recognition of the sovereignty of the public entity, once again contradicting the conventional wisdom that there is of no difference in bargaining between the two sectors. Although the bankruptcy of the public body must be voluntary, neither the municipality nor the school district can proceed without the authorization of the state government.⁸¹

In San Jose's case, a bankruptcy plan was agreed to under the amended Bankruptcy Code administered by a federal court.⁸² While the agreement secured the claims of the bondholders, the School District challenged its obligations to pay its non-bonded debts, in particular the claims of its organized schoolteachers.⁸³ Under the plan applicable to non-bonded debts, the Court ruled that the San Jose School District could reject the bargaining agreements it had previously signed with its teachers and other employees, and even roll back wages!⁸⁴ Later, however, the School District resolved its dispute with the teachers and other employees with an agreement to fund about sixty percent of the promised increases.⁸⁵

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

*C. The Philadelphia Story, 1992*⁸⁶

Philadelphia is the third model of municipal response to bankruptcy or the brink of bankruptcy. Unlike the other two models, the effective leadership of a newly elected Mayor, Edward G. Rendell, staved off insolvency. The details of his management of Philadelphia's financial crisis are significant because they reveal the numerous ways in which labor relations affect the fiscal health of a city. It is particularly noteworthy that Rendell addressed not only the typical labor relations problems associated with collective bargaining, but also those of the management of the City, and that management dealt with the City's numerous vendors of goods and services in order to restore fiscal solvency. In short, Mayor Rendell dealt with virtually all aspects of the financial bankruptcy Philadelphia faced.

When Mayor Edward G. Rendell took office on January 6, 1992, the City of Philadelphia was on the verge of financial collapse. It was running a \$230 million deficit on a \$2.3 billion a year operating budget. On his fourth day as Mayor, the City was so low on funds that it was preparing to skip payroll, a measure only averted by the City's request and a judge's approval that allowed Philadelphia to stretch out payments due to the Employee Pension Fund. The City's bond rating was below its investment credit rating; in fact, it was rated at junk bond status. The City had gone into the credit market in November of 1991, several months before Rendell was sworn in, and tried to borrow through short-term notes (the same practice New York City mayors engaged in during its financial crisis), but Wall Street would not buy the paper. A group of Philadelphia banks finally loaned the City money for a six-month period, but only at a rate of twenty-one percent in interest and fees. Because of Mayor Rendell's leadership, less than one year later the City was able to borrow the same amount of money, for the same period of time, and was able to obtain funds at rates of about 4.6%.

What can only be described as "text book" examples of runaway municipal labor costs, explicit monetary costs, and poor work rules (Luddism to an advanced degree) were largely responsible for the City's financial situation. The average employee cost the City more than \$50,000 a year in salary and benefits; the City paid 55¢ in benefits for every dollar of wages, an amount well above the average in the private economy. The work rules the union imposed were as burdensome as they were outlandish. A joke, which was not apocryphal but fact, recounted that it took three city

86. The principal source of the "Philadelphia Story" is the text of an address by the then Mayor Edward G. Rendell to the Manhattan Institute in New York on Nov. 10, 1993, available at <http://www.manhattan-institute.org/html/w11993.htm> (last visited Sept. 12, 2003).

workers to change a light bulb at the Philadelphia airport: a mechanic, an electrician and a custodian!

After becoming Mayor, and after months of fruitless talks with the unions for concessions, Mayor Rendell gave the unions a deadline to accept his final offer requiring changes in work rules, so that city managers could do their jobs. He also demanded a cut in paid sick leave from twenty days to twelve days and demanded that the unions accept a two-year wage freeze. The unions responded by promising to strike. To emphasize the seriousness of their threat and what the citizens of Philadelphia could expect, they placed full page advertisements in newspapers showing piles of garbage that hadn't been picked up. When the day of reckoning came and some unions did strike, Mayor Rendell's steadfastness and his determined policy to educate the public on the state of affairs, the work rules and excessive labor costs, paid off. He won millions in concessions from the municipal unions after a strike that lasted only sixteen hours.

Meanwhile, Mayor Rendell declined to raise taxes, often a popular but counterproductive plan. With a diminishing tax base evident, raising taxes would only have further compelled taxpayers, individuals, and businesses to leave the City. In the eleven years prior to Rendell becoming mayor, Philadelphia had raised taxes nineteen times. These were not minor fees or minuscule taxes. The nineteen increases included increases in business taxes, wage taxes, property taxes, and sales taxes. During those nineteen tax increases, sixteen percent of the sales tax base left the City. According to a study at the Wharton School, the City's wage tax alone in those eleven years had cost 150,000 jobs. In fact, the tax burden in Philadelphia was the third highest in the United States, behind only Portland, Oregon and Milwaukee, Wisconsin.

Rendell also rejected across-the-board layoffs in every department as a means of cutting costs. Instead, he cut the cost of governance across the board. On health costs, the City saved more than \$300 million over a four-year period. The average monthly costs for health care per employee represented by the City's four largest unions combined was about \$500 per month, or \$6,000 a year. That was reduced to about \$360 per employee per month. And the health care plan provided free doctor visits and no co-payments. It compared favorably to the best HMO managed care coverage in the City of Philadelphia. Prescriptions were virtually free, requiring only a \$1 or \$2 co-payment. The dental and optical plans had no co-payments.

Paid holidays are another benefit that had climbed to atmospheric heights. When Rendell became mayor, Philadelphia workers had about a month and a half of paid vacation, a total of forty-seven days. These consisted of two weeks paid vacation (ten working days), twenty sick days, and fourteen paid holidays, including President's Day and Lincoln's Birthday, Election Day, Flag Day, and Good Friday. Because employees

were given off Good Friday, they also received three administrative leave days, which any employee could take at will. This allowed Jewish employees to have the three major Jewish holidays off, making the total forty-seven days off with pay. To these were added the City's funeral leave policy, which allowed three days off for the death of one of the five major relatives in a family. So, if a City employee had a terrible year, that employee could get sixty-two days of paid days off in the City of Philadelphia. Rendell cut the number of paid holidays from fourteen to ten, a modest beginning.

By increasing the number of workdays, the workers not only returned more working time, but *ipso facto* reduced the time for which overtime and other penalty rates of pay would be required. For public safety, about forty percent of the City's work force, including police, firefighters, prison guards, and water service employees must work holidays, so the reduction in the number of paid holidays also meant a reduction in the number of days requiring overtime pay for security workers. Hence, on Flag Day, or on any other negotiated holiday, every worker would be paid at overtime rates. The elimination of frivolous paid holidays saved millions in overtime on each one reconverted to a workday.

Rendell also addressed the disability system, which like the holiday and other benefits systems, was out of control. Under the prevailing system a worker could receive a partial pension and workmen's compensation at the same time. In fact, the disability system paid workers more for not working than it did for working. Not surprisingly, there were frequent examples of double dipping. The *Philadelphia Inquirer* revealed an example of one egregious disability case. A worker claimed that he was injured on the job when he slipped on some ketchup at a seafood restaurant while having lunch. He claimed the injury was a work related disability because he said he was lunching with two other employees of his department and they were discussing business matters. The worker was awarded well over \$1 million dollars from the Pension Board.

Mayor Rendell also addressed the high labor costs of other governmental or quasi-governmental bodies such as the school districts, reducing their benefit packages by over \$400 million. He negotiated a new contract with the non-uniform municipal unions, and won arbitration awards with the police and firefighters' unions, which produced millions in concessions over a four year period. The Mayor admitted, nevertheless, that the City probably didn't do all that it should have. At the end of the Mayor's first fiscal year he had eliminated a \$450 million deficit without raising taxes. Despite the magnitude of these cost savings and the threats of strikes, Mayor Rendell said that implementing his program with the unions was relatively easy.

To deal with these and other exorbitant benefits and to balance the budget, Rendell sold city-run nursing services and home and health centers to private operators, and as part of the paring down process, the city planned to privatize another ten services. He also closed one library and reduced hours at others. He replaced 600 traffic lights with lower-cost stop signs. Working closely with the City Council, Mayor Rendell put together a five-year fiscal plan, which he had campaigned on during the election season. As part of the plan he adopted a bare-bones budget that included millions in savings from management streamlining.

At the same time, Rendell was a pivotal figure in getting the City's \$250 million Avenue of the Arts complex under construction by securing \$20 million from local philanthropist Walter Annenberg and a \$60.6 million grant from the state. That project, a complex of theaters and concert halls, along with a \$500 million convention center, gave Philadelphia a much-needed economic and cultural lift.

For these and other achievements, union officials denounced Rendell, accusing him of lacking a vision for the city. "There is a serious problem in a city when the primary concern is just the bottom line," said Thomas Paine Cronin, president of the American Federation of State, County and Municipal Employees District Council 47, which represents most of the city's white-collar employees. This amazing criticism shows how extensively Luddism has infected municipal unionism. It also parallels the view that unions in New York City expressed following the Financial Control Board's actions to block proposals by Mayor David Dinkins, which were financially unsound.

Similar to the case in New York, Philadelphia won some financial breathing room when the State of Pennsylvania's fiscal oversight board, the Pennsylvania Intergovernmental Cooperation Authority (the Authority), sold \$475 million in bonds for the City. The Authority watches over the City's adherence to its five-year plan. Under certain conditions it can withhold funding. Although reminiscent of the New York arrangements, this plan was not quite the state invasion of the city's sovereign powers that occurred in New York.

Mayor Rendell's negotiations with the municipal unions and his handling of the Philadelphia's fiscal crisis not only invited the criticism of local union leaders, but also caused attacks by virtually every leader of every national union in the country. They warned the Mayor that he could "run aground on this issue" (rationalizing costs) and threatened that as a Democrat he could not count on their political help in the future. The municipal unions weighed in with television advertisements against the privatization plans of the Mayor, claiming people would lose their jobs and depicting fathers coming home unable to feed their families anymore. Like welfare recipients, the municipal unions were claiming a right to an

income. They also charged that Rendell's program of privatization applied only to blue collar jobs. In fact, Rendell privatized as many white-collar services as blue-collar services in the first twenty-one months of his mayoralty.

The unions also attacked Rendell's racial politics. Unabashed racial appeals were made characterizing Mayor Rendell and his advisors as a group of white men in suits who wanted to take away jobs and benefits from poor, hard working black workers. However, the Mayor successfully insulated himself from the worst of these accusations because of his political alliance with the leading black political leader in Philadelphia and City Council president, John Street (who subsequently became mayor). The threats and slanders did not deter Mayor Rendell from carrying on with his fiscal plans. As a post-script, it is worth reporting that union leaders repeated their warnings and threats to Rendell at the 1992 Democratic convention.

Rendell also made it a policy that his administration was not going to balance the budget solely on the backs of the work force; everyone was going to have to bear a part of the burden; including citizens, workers, and managers. The Mayor and everyone else appointed to a management position took a five percent pay cut. Mayor Rendell not only renegotiated the City's labor costs, but also renegotiated the cost of goods and services sold to the City by vendors, to save more than half the money needed to avoid bankruptcy. He described this part of his reorganization program as management productivity. To that end, he created an Office of Management and Productivity, a first for the City of Philadelphia. Even more effective was the Mayor's Private Sector Task Force on Management and Productivity. Under this program, 300 executives were loaned to the City by private businesses who worked full or part time to provide support and recommendations to improve the efficiency of City Departments.

In dealing with its vendors, the City declared that it would expect at least a five percent reduction in the cost of doing business with all vendors who sold to the City without competitive bids. Law firms employed by Philadelphia were required to cap their fees in advance. The City substituted other law firms for those that refused. The City also stopped paying investment bankers for placing bond sales. Instead, their earnings would have to be derived from the sale of the bond issues. The Mayor commented that vendors of a major city have a tendency, either intentionally or unintentionally, to look upon the City as a fatted calf, because most of the bureaucrats who deal with them do not care about the costs of the transactions. Since it was other people's money, how the transactions were done didn't matter.

Fundamentally, the relationship between vendors and the City government is often a relationship between a political contributor and a

candidate, and vendors believe that the candidate will not act in any way detrimental to their political interests. Just like its labor contracts, there was a lack of oversight of vendor contracts by the City. The Rendell Administration made it policy to examine every contract and because of it, claimed to have saved millions of dollars.

An egregious example of the absence of oversight in contracts with vendors occurred when the City's Office of Management and Productivity brought to light early in Mayor Rendell's administration a lease on office space. The City had a year-to-year lease in what was classified as a Grade C building in which the Department of Public Welfare was headquartered. The lease on the building included a rental escalation every year of nine percent. At the time renewal came due, early in the Rendell Administration, the City was paying a rental charge of \$32 per square foot, compared to the \$27 per square foot that was then being charged by the One Liberty Place building, the tallest and newest building with the most dramatic architecture in the City of Philadelphia. The City then advised the landlord that unless he renegotiated the lease, the City would vacate the building. The landlord agreed to a renegotiated lease for \$8 per square foot. The City proceeded to renegotiate every lease it held and renegotiated the leases downward, with one exception.

Another vendor service the City addressed was insurance that covered city businesses. For example, the Philadelphia Parking Authority, which operated garages, parking lots and the like required large coverage of property, casualty insurance, and workmen's compensation. In the past, the mayor's favored broker won the contract for coverage, and then sought a national insurance company to write the insurance. Whatever rate the insurance company charged was then paid by the City. Under Rendell, brokers were required to submit competitive bids for the insurance. Competition saved dollars compared to the previous years. Moreover, the same company that won the insurance contract was also required to handle the City's claims.

As a vendor itself, the City rationalized its charges to some local suburban communities to which it had supplied waste-water treatment services. The year before Rendell became Mayor, the City increased its water rates in these communities. One of the communities refused to pay the increase and sued the City in court to prevent its implementation. Rendell and the Water Department decided to shut off the wastewater facility to that town, but under federal regulations, it had to give the community five years notice. Philadelphia then warned the town that it was giving notice immediately. Three months later that town settled and paid their water bill.

Instead of resorting to tax increases, Rendell instituted an improved method of collecting revenue, bringing in more tax receipts. In its first

year, the City collected about \$42 million more from the same tax base. Use of new software enabled the Revenue Department to increase its receipts. The City also started taxing firms and people who had never paid taxes before in Philadelphia. Lawyers and doctors who had their offices outside the City, but routinely came in to Philadelphia to practice paid no taxes. For example, a doctor who came into one of the City's renowned eye hospitals twice weekly, for forty weeks a year to perform cataract operations, did somewhere between six and eight cataract operations a year. He earned an estimated \$2.2 million of income for those eighty days in Philadelphia and didn't pay any taxes; now he and others like him do pay. Similarly, the City was able to tax accountants, lawyers, visiting athletes and even plumbers who came into the City to earn income.

Rendell introduced methods of increasing productivity that included such obvious measures as double zip coding the City's mail. In a similar vein, the City lacked an effective way of obtaining reimbursement from the State for people treated at its health centers who were without knowledge about their coverage. Many claimed to be covered by Medicaid, but after the City submitted the patients' bills to the State for reimbursement under the Medicaid program, the City found some were not actually covered. Conversely, some patients disclaimed coverage under Medicaid, although the Centers suspected from the patients' income profile that they were eligible for coverage by Medicaid. These individuals were required to fill out the requisite forms at the time of treatment, and after these forms were sent to the State, the City was reimbursed. After negotiations with the State of Pennsylvania, the State provided the City with the necessary computerized information on those covered under Medicaid, so the City now knew who was covered before providing treatment at District Health Centers. This enabled the City to recoup millions in health costs.

Because of civil service and union rules, incentives to work efficiently had dissipated. In an effort to restore incentives, the City established a productivity bank. The City set aside \$20 million from which departments could borrow for items deemed necessary but for which their regular budgets did not cover. A loan committee must first approve the loan. Upon approval, the loan is limited to five years and the department receiving the loan must demonstrate that it can save double the amount borrowed and repay the loan from its budget during the allotted period, with interest. An example was the experience of the City's Revenue Department. It borrowed \$5.8 million for a new package of software, which in a year was expected to net \$9 million in increased collections. Another example was the Streets Department, which borrowed \$350,000 for energy efficient lamps in buildings and within one year was expected to save about \$740,000. The Streets Department also borrowed for a computer system to allow it to deploy its sanitation trucks more efficiently;

the system cost about \$800,000 and will probably save \$4 million in the reduction of overtime and the ability to eliminate some middle management jobs.

Mayor Rendell's approach can be distinguished from the approaches of mayors from other troubled cities because of his willingness to break the traditional bounds of governance with new and more efficient ways of delivering services. His approach, *The Philadelphia Story*, also set it apart from New York City's experience.

III. EDUCATION, TEACHERS' UNIONS, AND THE LIVING WAGE

Municipal unionism severely challenges the effectiveness of municipal governance in public education. Public education is the largest consumer of local public funds⁸⁷ and involves two large unions. The National Education Association (NEA) is the largest in the country unaffiliated with the AFL-CIO, with about 2.7 million members.⁸⁸ The other teacher's union, the American Federation of Teachers (AFT), has about 1 million members.⁸⁹ Both unions must be regarded as significant obstacles to any competitive challenges because of their monopoly grip on public education. They consistently oppose competitive remedies for improving public education, such as privatization, and choice for parents in selecting schools for their children through the use of vouchers.⁹⁰ The AFT demonstrated its opposition to the most ambitious effort to date to grapple with the failed school system of the City of Philadelphia.

Like the City itself, the Philadelphia School system, the seventh largest in the country, was experiencing a huge budget deficit, \$216 million; its educational deficits included low test scores, chronic teacher shortages and crumbling buildings.⁹¹ However, unlike Mayor Rendell's

87. U.S. Census Bureau, *State and Local Government Finances by Level of Government and by States: 1999-2000*, U.S. Census Bureau tbl. 1, available at <http://www.census.gov/govs/estimate/00s100us.html>.

88. See National Education Association, NEA Fact Sheet, at <http://www.nea.org/presscenter/neafact.html>.

89. See *About AFT*, at <http://www.aft.org/about/proud.html>.

90. See generally Press Release, American Federation of Teachers, AFT Privatization Plan for Philly Schools is Wrong Rx for School Improvement (Nov. 12, 2001), at <http://www.aft.org/press/2001/111201.html>.

91. See *Philly Students Protest State's Takeover Plan*, CNN Education (Nov. 29, 2001), at <http://www.cnn.com/2001/fyi/teachers.ednews/11/29/philly.schools.ap/>; *Judge Allows Company to Manage Philly Schools*, CNN Education (Dec. 27, 2001), at <http://www.cnn.com/2001/fyi/teachers.ednews/12/27/philadelphia.schools.ap/>; *Court Action on Privatization Plan*, CNN Education (Dec. 20, 2001), at <http://www.cnn.com/2001/fyi/teachers.ednews/12/20/philadelphia.schools.ap/>; Jay Mathews, *The Philadelphia Experiment*, EDUCATION NEXT, Winter 2003, at 50-56, available at <http://www.educationnext.org/20031/pdf/50.pdf>.

approach of addressing City problems directly, the state intervened. In 1998, Pennsylvania enacted a law allowing a state takeover of Philadelphia schools if it failed to meet budgetary and educational goals.⁹² The goals were not reached, so by agreement with the City administration, the State of Pennsylvania proposed an ambitious reform effort that was expected to turn over dozens of low-performing schools to a private company, the New York-based Edison Schools Inc., the nation's largest for-profit education company.⁹³ State officials proposed a contract with Edison believed to be worth more than \$100 million.⁹⁴ Under the State's plan, Edison would run dozens of schools and control the central management of the school system.⁹⁵ A five-member School Reform Commission, established under the State's takeover, was to replace the School Board.⁹⁶ Unsurprisingly, the plan generated fierce opposition from Philadelphia teachers, blue-collar school workers, minority leaders, student activists, the School Board, the City Council, and parent and community groups.⁹⁷ About two dozen protesters occupied a school administration building, demonstrating their First Amendment rights.⁹⁸

School takeovers and school privatization are not new issues. Forty districts in 18 states have been taken over, and some cities tried private management of individual schools, among them Baltimore, Minneapolis and Hartford.⁹⁹ But Philadelphia's take-over would be the largest school district ever taken over by a state government, as well as the largest experiment in school privatization.¹⁰⁰

However, Governor Schweiker accepted a scaled down plan because of opposition from Mayor Street and others.¹⁰¹ The School Reform Commission voted 3 to 2 to change the school system for more than one-quarter of the City's schools, which impacted thousands of children, effective in September 2002.¹⁰² The Commission members appointed by the Governor voted for the plan; the two appointed by Mayor Street voted against implementation.¹⁰³ Under the plan, twenty schools were turned over to Edison, twenty-two were turned over to other private companies; the City's three major universities, the University of Pennsylvania, Temple

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

University, and Drexel University were to participate in overseeing some of the affected schools; and an additional twenty-eight schools were to be run by parents.¹⁰⁴ These schools will not just be privatizing some of their services, such as food preparation and cleaning, but academic programs and the management of teachers also will also be overseen by outside managers.¹⁰⁵

The two teachers' unions, the NEA and the AFT, are very likely to merge in the near future creating the largest union in the world.¹⁰⁶ This will enhance both their political clout and their ability to thwart competitive measures for improving education, which are so desperately needed in the inner cities. They are already the most effective practitioners of political-unionism in the United States, so their opposition to educational reform is now the greatest challenge of municipal unionism to municipal governance. "Political-unionism" is an expression describing how the unions rely extensively on political action at all levels of government -- local, state and federal -- to enhance the standard trade-union function of bargaining over wages and other conditions of employment. The fusion of politics and bargaining power has already been exercised at all levels of government with successful political and bargaining results. The two teachers' unions maintain more political operatives than either, and perhaps both of the major political parties.¹⁰⁷ They constitute the acme of political bargaining in the country.

Traditionally, the Democratic Party has been the de facto Labor Party in the United States. This characterization is still true despite the recently adopted political position of James Hoffa, president of the Teamsters.¹⁰⁸ Hoffa has changed his union's automatic endorsement of the Democratic Party, followed by the AFL-CIO and its president, John J. Sweeney, and the overwhelming bulk of the union movement.¹⁰⁹ Hoffa announced his intentions to support Republicans as well as Democrats whom he regards as pro-union.¹¹⁰ Teamsters' support for drilling in Alaska is one current issue creating this rupture.¹¹¹ Drilling would lead to new jobs for Teamsters and for some other unions as well.¹¹² However, the two teachers' unions are

104. *Id.*

105. *Id.*

106. *Id.*

107. MYRON LIEBERMAN, THE TEACHER UNIONS: HOW THEY SABOTAGE EDUCATIONAL REFORM AND WHY 69-70 (2000).

108. DIRECTORY OF U.S. LABOR ORGANIZATIONS, (Court Gifford ed., 2002).

109. Richard A. Ryan, *Hoffa Breaks Mold, Backs Pro-Labor GOP Candidates*, DETROIT NEWS, May 26, 2002, available at <http://www.detnews.com/2002/politics/0205/26/a01-499505.htm>.

110. *Id.*

111. Lieberman, *supra* note 107.

112. Building unions would have jobs in Anwar if drilling is approved.

almost certain to become the dominant labor organizations in the country. They are more representative of the future direction of the Labor Movement than the Teamsters. The NEA alone has more than double the membership of the Teamsters.¹¹³ Furthermore, in Britain, the Labor Party remains closely linked to British unions despite the unions' lack of firm commitment to support the Party.

On their road to complete merger, local and state groups of the two teachers' unions coordinate activities and may be said to have actually merged.¹¹⁴ Nationally, the two teachers' unions have set up a joint structure to pursue their agenda, the NEAFT Partnership Joint Council.¹¹⁵ The Council has outlined issues on which both organizations may work together, such as educational standards, labor-management cooperation, and political activity.¹¹⁶ The Council and the separate organizations must understand that labor-management cooperation imply increased union participation in instruction and curricula. As part of the merger, the new union will most likely be an affiliate of the AFL-CIO. Subsequently, the new affiliate will probably lead the Federation, a position that will politically shift the central body of organized labor in the United States further to the left.

Another dimension of the rising power of the teachers' unions is their impact on the character of the Labor Movement. The combined ranks of the two unions and other government unions have already changed the historic character of the American Labor Movement from a blue-collar movement to a professional white-collar movement. Because of the number of teachers, professional workers will constitute the bulk of the union membership for the first time in the history of the American Labor Movement. This will only reinforce their challenge to municipal governance.

A third issue that will challenge municipal governance is the growing demand by unions, radicals, and social reformers that cities enact "living wage laws." The living wage actually applies directly to few, if any, unionized workers. So why do unions join forces with activists to achieve its enactment by municipal governments? In brief, the living wage is no more than a legally enacted higher minimum wage. The same economic analysis applies to it as to the minimum wage. The unions' demands for the living wage are motivated by several concerns, none of which are altruistic, such as concern for all workers. Instead, pragmatism motivates the unions' advocacy. Wage scales enacted under the living wage, like the

113. DIRECTORY OF U.S. LABOR ORGANIZATIONS, *supra* note 108.

114. *Id.*

115. See NEAFT Partnership Document, at <http://www.aft.org/neaft/index.html> (last visited Sept. 14, 2003).

116. *Id.*

minimum wage, are intended to justify subsequent demands for higher wages in collective bargaining agreements. This is in order to restore the wage differentials diminished by the legal enactment of a living wage. Another compelling reason for the unions' demands for living and minimum wages is that these laws help reduce the competition of lower paid workers for union jobs. If the living wage provisions do affect some unionized workers, it is tantamount to a confession by the unions that they have failed to gain wage increases for the lowest strata of occupations and that they now must turn to local government to provide higher wage scales.

Paradoxically, the unions' campaigns for the living wage will probably come back to haunt them. To the extent that unorganized workers' receive benefits, wages or any other job related advantages by law, the need of unorganized workers to join unions for the same benefits via collective bargaining is reduced. In fact, this rationale has contributed to the decline of private unionism. Although public sector membership continues to be stable, living wage enactments can be expected to diminish the competitive attractiveness of collectively bargained wages. Historically, it is worth noting that the American Federation of Labor (AFL), a predecessor of the contemporary AFL-CIO, and the initiator of the modern American Labor movement, regarded governmental programs like minimum wages in this light, and therefore regularly opposed them until the New Deal in the 1930s.

IV. HOW PUBLIC EMPLOYEES BECAME ORGANIZED

Underlying the uniqueness of the public sector model of bargaining is the way in which public employees became organized. This history sheds a great deal of light on why municipal unionism is so effective at bargaining. Moreover, it is a history far different from the origins and development of unions in the private labor market.

Four methods account for the rise and expansion of public employee unionism: employer assistance, self-organization, and most importantly, transformation of public employee organizations into unions. Public employers' assistance to unionization might sound like an oxymoron, but it has played a significant role in the rise of public unionism.¹¹⁷ Unlike private employers, who almost universally oppose the unionization of their employees, public employers have encouraged the unionization of employees under their administration for political reasons.¹¹⁸ Public employers, often dressing their motivations in the pious clothing of helping low paid workers, have encouraged unionism and collective bargaining so

117. Leo Troy, *Has Public Sector Labor Topped Out?*, 17 GOV'T UNION REV. 1 (1996).

118. *Id.*

decisively that the same actions by a private employer toward a labor organization would be ruled as company domination of a labor organization under the National Labor Relations Act (NLRA). The National Labor Relations Board (NLRB) would find that the same practices violated the right of employees to form, join, and assist labor organizations of their own choosing. The NLRB would declare the employer's relationship with the labor organization to be an unfair labor practice and remedy the violation by disestablishing the labor organization.¹¹⁹

However, such is not the case in the public domain; the public sector is not subject to provisions of the NLRA. A preeminent example of employer interference with the right to organize in order to establish unionism and collective bargaining was the organization of Los Angeles County's 70-80,000 home care workers in February 1999.¹²⁰ The unionization of Los Angeles County's home care workers began with the enactment of a state law permitting local jurisdictions to create an agency that would become the legal employer of all home care employees. The law was enacted as a special indulgence for public sector unions which had been unable to organize in the old-fashioned way. Unions lobbied vigorously for the law because prior to its enactment, one of the unions most directly involved, the Service Employees International Union (SEIU), an affiliate of the AFL-CIO, was unable to organize the thousands of Los Angeles County home care workers. Before the enactment of this law, the County employed home care workers as independent contractors. John J. Sweeney, leader of the SEIU and now president of the AFL-CIO, was unsuccessful for more than a decade in organizing home care workers throughout California, with Los Angeles County as the greatest prize. To overcome the union's lack of success in organizing, the new law enabled Los Angeles County and all other jurisdictions in California to establish a public employer of their home care workers. This replaced the previous arrangement under which individual home care workers had a contract with the County. That enactment spawned not only the organization, but also the unit appropriate both for a representation election and, after the anticipated union victory, for collective bargaining.

In 1997, under the new law, Los Angeles County established a fifteen-member Personal Assistance Services Council (PASC) and made it the employer of the County's thousands of home care workers. The county

119. Disestablishment means that the organization can never represent the employees even if it could sever its illegal relationship with the employer.

120. The author assumes that there is a state and/or perhaps an L.A. County law which recognizes the rights of workers to form, join, and assist labor organizations of their own choosing without interference, but if so, it did not come into play in this instance. The basis for this discussion is derived from *Can Cyberspace Revive Organized Labor Here and in Canada?*, Paper Presented to the Canadian Industrial Relations Association (2001).

supervisors appointed the members of the Council, who served without compensation. Of these, at least eight were present or former clients of the County's In-Home Support Services Program, while the other members were recruited from among consumer activists; these could also be members of the SEIU. No other "public members" were specified. Only employees of the County were specifically excluded from membership on the Council. This was hardly a provision avoiding employer assistance and domination of the labor organization. Neither the County's Service Council nor the county supervisors opposed or objected to any of the union's organizational activities. Quite to the contrary, each of them encouraged and assisted the union's organizational campaign. Indeed, the Chairman of the Los Angeles Board of Supervisors publicly championed the creation of the Council and its operations. Such encouragement of unionization in the private sector had been banned since the implementation of the NLRA. By empowering former clients to determine the Council's policies, the Council skewed the election and influenced whether workers organized. Under these circumstances, the NLRB would have found the union to be the creature of the Los Angeles County Board of Supervisors and its fruit, the Personal Assistance Services Council, since it actively interfered with the free choice of the home care workers.

The composition of the Council, its control over policy, and the Council's encouragement of the "organizing drive," would, in the private sector, have led the NLRB to find these groups guilty of unfair labor practices for dominating a labor organization. It then would have ordered the disestablishment of the SEIU's tainted local as the bargaining representative of the home care employees. Under the NLRA, as a result of the Taft-Hartley Act's amendments in 1947, a local of an international union could be disestablished because of a "sweetheart" arrangement establishing the local as the employees' bargaining representative. This episode also casts a revealing light on Sweeney's boastful claims of being a successful organizer. Because of the County's actions, within two years, the Service Employees International Union, after a representation election, was able to enroll the County's home care workers after more than a decade of failure. It would be naive to regard the representation election as untrammelled and unaffected by employer preference, and yet the unions' win of the representation election was greeted with applause by sympathetic media and academics.

The Los Angeles County model was emulated in Oregon. In December 2001, about 13,000 home care workers in Oregon joined SEIU Local 503 following a mail-ballot election, a much easier way of polling the workers. For four years, the union tried to organize these workers without success, paralleling the experience of Los Angeles County. After voters, with the active support of organized labor in Oregon, approved the

establishment of a statewide Commission to become the employer of the home care workers, again paralleling the L.A. procedure, the home care workers were finally organized. The Los Angeles County experience was obviously the model.

In contrast to the two examples of elections organized and supported by public management, the available record for all representation elections in the public sector shows that representation elections have played a minor role in organizing government employees. Thus, representation elections and voluntary recognitions among state and local government employees in the years 1991 and 1992, the only years with available data, show that over 92,500 state and local employees were reported as "net gains" from these procedures.¹²¹ Yet state and local membership increased by only 32,000 during this period, less than one-third the "net gains" of employees choosing unions.¹²² If coverage instead of membership is used, then state and local union representation fell by 55,000.¹²³ The number of representation elections held in the public sector is small because unions do not need them. Unions are frequently encouraged by public management to organize and bargain, as demonstrated by Los Angeles County. It is no surprise that when public employees do experience a representation election, regularly eighty percent or more vote yes.¹²⁴ In contrast, in the private sector, unions win barely fifty percent of elections.¹²⁵ While private management opposes unionization of their employees, the outcomes are subject to the procedures of the NLRB and the judiciary in order to determine whether there was illegal employer interference. In contrast to the private sector, it is rare, perhaps even unknown, to find examples of employer interference to prevent unionization in the public sector. In fact, as just detailed above, that interference is typically in support of unionism and collective bargaining. If organized public workers become dissatisfied with their bargaining representative, there is little evidence that they can or do decertify that representative. Decertification of union representatives is virtually unknown in the government domain, while in the private labor market, where they have existed since 1947, unions lose the overwhelming percentage.¹²⁶ These factors indicate that the labor-management relations in the public labor market are frequently less than at arms-length, yet another characteristic making labor management relations in government unique.

121. Tom Juravich & Kate Bronfenbrenner, *Preparing for the Worst: Organizing and Staying Organized in the Public Sector*, in ORGANIZING TO WIN 262 (Kate Bronfenbrenner et al. eds., 1998).

122. BARRY T. HIRSCH & DAVID A. MACPHERSON, UNION MEMBERSHIP AND EARNINGS DATA BOOK 18 tbl. 1g.

123. *Id.*

124. Juravich & Bronfenbrenner, *supra* note 121.

125. LEO TROY, BEYOND UNIONS AND COLLECTIVE BARGAINING (1999).

126. *Id.*

The third method by which public employees became organized was through the transformation of existing public employee groups into unions. The two most important examples were the National Education Association (NEA), independent of the AFL-CIO, and the American Federation of Teachers (AFT), an affiliate of the Federation. Until the 1960s, both regarded themselves as professional associations, not unions.¹²⁷ The AFT, although a longtime affiliate of the American Federation of Labor and then the AFL-CIO, abjured the strike and collective bargaining. But following President Kennedy's Executive Order 10982 issued in 1962, which facilitated unionism and collective negotiations in the federal government, state and local governments adopted policies fostering unionism and bargaining.¹²⁸ This led the two major organizations of teachers to transform themselves into unions embracing bargaining and striking, even though strikes were banned almost everywhere by law.¹²⁹ Hundreds of other organizations of state and local government employees—public employee associations and professional associations like the American Association of University Professors—likewise transformed themselves into unions and engaged in bargaining as a result of state and local governmental policies favoring unionism and collective bargaining.¹³⁰

The fourth way public employees and similar groups became unions was their absorption or merger with existing unions, principally unions in the private sector. The outstanding example of a private union acquiring public employee groups was the Building Service Employees International Union, an affiliate of the AFL-CIO.¹³¹ By taking this step, the union transformed itself from a small private union (important in large cities because of its strategic economic position) into one of the largest unions in the country. Because of the transformation from a private to a predominantly public sector union, it also changed its name to the Service Employees International Union (SEIU).¹³² The conversion was accomplished under the aegis of John J. Sweeney, now president of the AFL-CIO, and was doubtless a major factor in his elevation to that office under the popular belief that he had succeeded in organizing. However, the actual key to SEIU's success was merger and acquisition, not organizing the unorganized. Many other private sector unions jumped in to pick up public unions because gaining members in that manner was easy, certainly by comparison to organizing the unorganized, and because they were losing

127. *Id.*

128. Leo Troy, *White-Collar Organization in the Federal Service*, in *WHITE COLLAR WORKERS* 166 (1977).

129. LEO TROY, *THE NEW UNIONISM IN THE NEW SOCIETY* (1999).

130. *Id.*

131. *Id.*

132. *Id.*

large numbers of members in the private labor market.¹³³ None, however, enjoyed as much success as Sweeney and the SEIU.

V. CHARACTERISTICS OF LOCAL BARGAINING

The unique character of collective bargaining in the public sector also stems in great measure from the history of labor relations in government prior to collective bargaining. Like the contemporary public employee unions, their predecessor organizations, public employee and professional associations, relied on lobbying and political actions to gain improvements in earnings and working conditions. That experience was the predecessor of today's political collective bargaining.

Structurally, governmental labor relations are local as in the private sector, but localism in collective bargaining enhances the key difference between the two sectors, again, because of its political dimension. Localism in governmental collective bargaining is embedded in the structure of both unionism and in government. Overall, as previously noted, there are approximately 45,000 local and district unions in the Labor Movement, and perhaps close to forty-four percent in the public sector, based on the proportion of total membership in government employee unions. The number of local governmental jurisdictions is also very large, at over 87,000. So, like the unions, the structure of the political jurisdiction is a priori set up to bargain at the local level. This structure naturally lends itself to the localized character of municipal bargaining. It can be described as the necessary condition for municipal collective bargaining; the political dimension is the sufficient condition for the uniqueness of municipal bargaining and its challenge to municipal governance.

VI. CONCLUSIONS

This paper has considered the question of whether municipal collective bargaining and municipal governance may co-habit.¹³⁴ Yes, they may co-habit, but this system is detrimental for the recipients of public services. The costs to the community in financial exigencies, the undercutting of municipal sovereignty, and, above all the monopoly control of education, outweigh the benefits. Indeed, what are the benefits of municipal unions and collective bargaining? Were public workers exploited by public jurisdiction prior to collective bargaining? Were public employee's wages historically less than their marginal revenue product? And were municipal employees treated to arbitrary discipline and

133. *Id.*

134. "Co-habit" is an expression about governance that emerged in France.

discharge? Perhaps, but most likely governance of employee conditions under civil service procedures avoided exploitation of employees subject to its rules. But all that is past. Irrespective of any benefit/cost analysis, it is clear that public unionism and collective bargaining are permanent fixtures in municipal government.

Given that fact, this paper considered the costs of an ongoing system. On the fiscal side, municipalities have faced debilitating losses in their tax bases, and a loss of jobs in the private sector. On the other hand, the demand for services supplied by municipalities is constantly expanding due to the decline of family units, a dependent welfare population, the need to deal with the widespread use of drugs, crime, and above all, a dysfunctional school system. These demands are compounded by a collective bargaining system inextricably linked to political logrolling. Thus, the reconciliation of effective governance and municipal unionism is, to say the least, a challenge.

The three models of insolvency discussed here illustrate the severity of the problem. When labor demands lead to a reorganization of bankrupt local governmental bodies, whether *de facto* or *de jure*, it is not the equivalent of the "exit voice" of failed private businesses. Markets will substitute for failed businesses, with replacements affording the private consumer alternatives. But the public consumers, the citizens, have no alternatives to the same political jurisdiction, which failed financially, except to emigrate, and population statistics show that people do vote with their feet. Separately and collectively these factors demonstrate that public sector collective bargaining, particularly municipal and school district bargaining, make the portrayal of similarity between public and private collective bargaining deceptive. Public sector bargaining, especially at the local level, is *sui generis*.

Nevertheless, I conclude that unions are compatible with municipal government for a price, the price of high labor costs, deficiencies in the quality of service (especially in education), going to the brink fiscally, and on occasion, municipal insolvency. However, that price is seldom brought home to the citizens at large. When insolvency results, only when it is resolved by actual bankruptcy would the public see the difficulty of reconciling public policies promoting municipal collective bargaining and municipal governance. As financial exigencies developed, they engendered the notion of "ungovernable cities," a political excuse for the failure of municipal management. Allowing cities to go bankrupt may be necessary to restore sound municipal governance. Perhaps only then will the sources of funds (taxpayers) and users of municipal funds (demanders) learn that municipalities do have finite financial limits. As a surrogate for competition in the private economy, bankruptcy could introduce the discipline private labor relations confront.

The three episodes discussed here show that municipalities are not unmanageable, as some have claimed. However, over the long run, it will be necessary to change the culture of a municipality's work force. Unlike the private sector, where domestic and international markets (competition) check the monopoly power of unions, in the public sector, countervailing forces are limited. Privatization and contracting out tasks are the two most often involved, but they are limited by the unions' political power. Three other forces that rein in the runaway effects of powerful municipal or local unionism are a take-over by a higher political jurisdiction (New York), bankruptcy (San Jose School District), and aggressive governing by the city administration (Philadelphia). Each is time consuming and extremely difficult to implement against unions determined to maintain their grip on the local governmental economy. Their attitude has resurrected the witticism of King Louis XIV of France, whose spending had run uncontrolled ("Après moi, le deluge").

Finally, a promising area of research lies ahead in the subject of municipal unionism and municipal governance, but that this research has been swept under the rug by the conventional wisdom's erroneous claim that bargaining in the public sector is merely an extension of that in the private labor market. If this paper dispels that notion, it will have made a contribution to reconciling the question: are municipal collective bargaining and municipal governance compatible?